Supreme Court, U.S.
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In the

# Supreme Court of the United States

United States of America,
*Respondent,*

v.

(1) Harold M. Armstrong,
Also known as "Bo,"
and
(2) Carl E. Brown,
*Petitioners.*

ON PETITION FOR WRIT OF CERTIORARI FROM THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT IN FILE NOS. 99-1190 AND 99-1191

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS SUBMITTED FOR REVIEW

I. Does the National Park Service regulation which prohibits carrying passengers for hire within Voyageurs National Park without an exclusive permit violate the guaranty of free and open navigation of boundary waters contained in the Webster-Ashburton and Root-Bryce Treaties or discriminate against the petitioner Armstrong because he as a Canadian citizen with a Canadian vessel is ineligible for the permit?

II. Does the National Park Service have jurisdiction or authority to enforce 36 C.F.R. § 5.3 on the waters within Voyageurs National Park?

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September 10, 1999, Order of Eighth Circuit United States Court of Appeals

## JURISDICTIONAL STATEMENT

The District Court for the District of Minnesota had original jurisdiction in this criminal case pursuant to 18 U.S.C. § 3231. The petitioner Harold "Bo" Armstrong and Carl Brown were cited by National Park Service rangers for violation of 36 C.F.R. § 5.3. Pursuant to 16 U.S.C. § 3, violations of National Park Service regulations are crimes. The Armstrong and Brown cases were consolidated for trial and on appeal.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254 to review by writ of certiorari the judgment of The Eighth Circuit United States Court of Appeals affirming the decision of the district court. The judgment was filed on July 28, 1999, and the order denying the petition for rehearing was dated September 10, 1999. This petition for a writ of certiorari is timely filed within 90 days of that order.

The issues in this case raise significant and recurrent questions on federal jurisdiction and administrative actions and affect important treaty rights guarantied to the citizens of

both countries regarding the international boundary waters within Voyageurs National Park.

## STATUTES, TREATIES AND REGULATIONS INVOLVED

Article II of the Webster-Ashburton Treaty of 1842, 8 Stat. 572 (1842) provides:

> It being understood that all the water communications and all the usual portages along the line from Lake Superior to the Lake of the Woods, and also Grand Portage, from the shore of Lake Superior to the Pigeon River, as now actually used, shall be free and open to the use of the citizens of both countries.

8 Stat. 572, 574 (1842).

Article I of the Root-Bryce or "Boundary Waters" Treaty of 1909, 36 Stat. 2448 (1909) provides:

> The high Contracting Parties agree that the navigation of all navigable boundary waters shall forever continue free and open for the purposes of commerce to the inhabitants and to the ships, vessels, and boats of both countries equally, subject, however, to any laws and regulations of either country, within its own territory, not inconsistent with such privilege of free navigation and applying equally and without discrimination to the inhabitants, ships, vessels, and boats of both countries.

36 Stat 2448, 2449 (1909).

Voyageurs National Park Act, P. L. 91-661, 84 Stat. 1970 (codified as amended at 16 U.S.C. § 160, 160a to 160k), Section 304, states:

> Nothing in this subchapter shall be construed to affect the provisions of any treaty now or hereafter in force between the United States and Great Britain relating to Canada or between the United States and Canada, . . . which by its terms would be applicable to the lands and waters which may be acquired by the Secretary hereunder. . . .

16 U.S.C. § 160i.

Minnesota Statutes, § 84B.061 provides:

> In making these [land] donations, none of the navigable waters within the [Voyageurs National] Park and the lands under them have been donated to the United States. These navigable waters include the following: Rainy [Lake] .... Pursuant to applicable federal and state law, navigable waters and beds are owned by the state of [Minnesota]. Ownership and jurisdiction over these waters and their beds ha[ve] not been ceded by the state of [Minnesota], either expressly or implicitly, to the United States.

36 C.F.R. § 5.3 (1998) provides:

> Engaging or soliciting any business in park areas, except in accordance with the provisions of a permit, contract, or other written agreement with the United States, except as may be specifically authorized under special regulations applicable to a park area, is prohibited.

## STATEMENT OF CASE

### Procedural History.

This is a petition for a writ of certiorari regarding the Eighth Circuit Court of Appeals judgment (Appendix, hereinafter "A.", at 24) affirming an order of United States District Court Judge John Tunheim, District of Minnesota. (A. at 19; Record, hereinafter "R.", at 139-143). The order affirmed an earlier order of United States Magistrate Judge Randall Burg finding the petitioners Carl Brown and Harold "Bo" Armstrong guilty of conducting commercial operations within Voyageurs National Park without a permit in violation 36 C.F.R. § 5.3. (A. at 1).

The underlying facts are undisputed. Both Brown and Armstrong admitted that on August 9, 1996, they separately carried paying passengers on the international waters of Rainy Lake but within the exterior boundaries of Voyageurs National Park. (R. at 139).

This case was filed by the United States in the United States District Court for the District of Minnesota for a violation of conducting commercial operations within a national park without a permit. (R. at 1). Harold Armstrong consented to being tried before a United States Magistrate Judge. (R. at 2). A joint trial was conducted before the Magistrate Judge on December 10 and 11, 1997. (Trial Transcript Vol. I and II, hereinafter "Tr."). The Magistrate issued a written Order and Judgment finding Brown and the petitioner Armstrong guilty of conducting commercial operations within Voyageurs National Park in violation of 36 C.F.R. § 5.3. (R. at 62-80). The two were sentenced on June 30, 1998, with the judgment and commitment order being filed on July 23, 1998. (R. at 85-87).

Armstrong appealed the Magistrate's Order and Judgment to the United States District Court for the District

of Minnesota. (R. at 88-89). The District Court Judge affirmed Armstrong's conviction by written Order dated January 5, 1999. (R. at 139-43). The Eighth Circuit United States Court of Appeals affirmed by a judgment filed on July 28, 1999, and denied a petition for rehearing by an order dated September 10, 1999. (A. at 24, 43).

Armstrong challenges his conviction for transporting paying passengers without a permit on the grounds that 36 C.F.R. § 5.3, as applied in this case, is in direct conflict with the mandates of the Voyageurs National Park Act at 16 U.S.C. § 160i which incorporates the protections of two international treaties governing these border waters, treaties which guaranty the right of free navigation of these boundary waters and nondiscrimination against Canadian citizens and boats using them. (R. at 64).

The issues in this case raise significant and recurrent questions on federal jurisdiction and administrative actions and affect important treaty rights guarantied to the citizens of both countries regarding the international boundary waters within Voyageurs National Park.

**Facts.**

The area encompassed by Voyageurs National Park was part of the traditional fur trader's route which forms a significant part of the border between Minnesota and Canada. Unlike the smaller portage lakes in the Boundary Waters Canoe Area, the main lakes the American sides of which are included in Voyageur's National Park, including Rainy Lake, are large. (See map, A. at 42). The American side of Rainy Lake extends approximately 40 miles east-west and contains many islands of varying size. The Voyageurs National Park legislation specifically provides for motorized boat traffic on the larger lakes within it including Rainy Lake. 16 U.S.C. § 160h(3). Motorboat use on Rainy Lake in the park includes

fishing boats, runabouts and houseboats. The need for citizens of both the United States and Canada to travel the border and other waters between the United States and Canada for commercial and other purposes unimpeded was considered so important that the Webster-Ashburton Treaty under which the Minnesota boundary between the United States and Canada and other boundary issues were resolved included the reciprocal use of the navigable channels in the St. Lawrence and other rivers and, at Canadian insistence, the right of free passage to citizens of both countries from shore to shore throughout the boundary waters:

> Given this information, Webster agreed to Ashburton's proposal concerning Sugar Island and the common use of navigable channels in the St. Lawrence and St. Clair rivers. He asked only for reciprocity with respect to the channel on the Canadian side of Bois Blanc Island in the Detroit River and for a slight alteration west of Lake Superior. He proposed that the boundary run through the mouth of the Pigeon River and along the old commercial route to Rainy Lake, because "It is desirable to follow the description and the exact line of the original treaty as far as practicable." To satisfy Ashburton, however, he agreed that all waterways and portages along the boundary line should be used freely by both nations.

Minnesota's Boundary with Canada, Minnesota Historical Society, 1980, at 68, quoting and referencing letters between Daniel Webster, United States Secretary of State, and Lord Ashburton, special envoy for Great Britain.

Rainy Lake has continued to have commercial water traffic from the days of the voyageurs to the present era, and citizens of both countries have enjoyed unimpeded travel

throughout the lake consistent with the treaty guaranties. The lake is large enough, and weather sufficiently severe at times, that the ability to use alternate routes in navigating the lake is important. Various routes and channels on the lake are more protected and safer depending on conditions.

On August 10, 1996, Harold "Bo" Armstrong was cited by the National Park Service for operating a commercial boating tour without a permit when he entered into the international waters of Rainy Lake located within the geographic boundaries of Voyageurs National Park. (R. at 1). Defendant Armstrong is a Canadian citizen who lives in Fort Frances, Ontario. (Tr. at 415, 393). Along with Carl Brown, Armstrong challenges the National Park Service's authority to limit his right to travel the international waters lying within the Voyageurs National Park boundary lines. (Tr. at 403-404).

On the date in question, Armstrong and Brown started their combined tour just west of the Park boundary[1] (Tr. at 140-141). The destination of the tour was Hale Bay, which is a very scenic bay at the easternmost end of Rainy Lake and is located in Canada. (Tr. at 148, 410). It is undisputed that for tour vessels of the size used by Armstrong and Brown to safely take passengers from the Canadian Point dock on Rainy Lake to Hale Bay on Rainy Lake, the vessels would have to cross the boundary of Voyageurs National Park at some point[2] (Tr. at 45, 55-56, 406).

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[1] Defendant Armstrong boarded his paying passengers at the Point dock in Fort Frances, Ontario, Canada, while Defendant Brown boarded his paying passengers at Thunderbird Lodge in the United States. They came together near Thunderbird Lodge on the United States' side of Rainy Lake and outside of the park boundary. (Tr. 140-141, 385, 404).

[2] That portion, as testified to by Chief Park Ranger Bruce McKeeman, is the Brule Narrows where the international boundary follows a very narrow waterway and the marked navigational channel

Armstrong and Brown proceeded due east from their meeting point and entered the exterior boundary of Voyageurs National Park. (Tr. at 141). Approximately one-and-a-half miles into Voyageurs National Park, near Bushyhead Island, both Armstrong and Brown were stopped by park rangers. (Tr. at 43, 91, 119-20). They were issued citations for engaging in business operations within the park without a permit, a violation of 36 C.F.R. § 5.3. (Tr. at 94, 124). At the time Armstrong and Brown were flagged down, they were traveling along a Coast Guard designated navigational channel of Rainy Lake marked by floating buoys. (Tr. at 51-54). At no time did they touch upon or dock on the lands of Voyageurs National Park. (Tr. at 378, 405-06).

At trial, the Chief Ranger of Voyageurs National Park testified that part of the usual and ordinary course of travel from the eastern to the western end of the lake was through a marked channel which is located in Voyageurs National Park on the American side of Brule Narrows, that not following this channel would not be safe because of navigational hazards outside the channel, and that Canadian tour boats would be permitted to use the channel even though this would constitute a violation of the permit requirement. (Tr. At 45-46, 55-56). He testified it would not be a permit violation for a Canadian tour boat to seek shelter in the park in bad weather. (Tr. At 68).

Mike Williams, a U.S. Coast Guard lamplighter in Voyageurs National Park, that is, a person who maintains the Coast Guard navigational buoys (Tr. at 207), and a longtime resident and user of Rainy Lake, including having had family ownership and operation of Kettle Falls Hotel, located in the eastern end of the lake (Tr. at 215), testified that commercial traffic on the lake has a long and continuing history and that,

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necessarily passes into the Minnesota side of Rainy Lake to avoid water-borne hazards. (Tr. at 45, 55-56).

prior to the creation of the park, people traveled both sides of the lake without restriction. (Tr. 215-2616). He further testified that various channels on Rainy Lake are safer depending on weather conditions. (Tr. at 218-219).

Additional evidence was presented outlining the long history of waterborne commerce on Rainy Lake (Tr. at 259). Robert Hilke, the holder of the park tour boat permit for Rainy Lake, testified that he usually began and ended the tours from the park visitor center and that the tours stop at docks in the park and at Kettle Falls (Tr. at 170-171). He further testified that he was allowed to run his tour boat into Canadian waters (Tr. at 181) and that he had no objection to a vessel of Armstrong's size carrying passengers for hire in Voyageur's National Park (Tr. at 183-184). He testified that various channels on the Canadian or American side of Rainy Lake are safer depending on weather conditions. (Tr. 175-176).

Voyageurs National Park, under current management rules and regulations, issues only one tour boat permit for Rainy Lake. (Tr. at 56).

## ARGUMENT

### Standard of Review.

Armstrong challenges his conviction on the basis that the National Park Service cannot regulate Voyageurs National Park in derogation of its enabling statute. The court ruled that the treaty language which is incorporated into the Voyageurs National Park Act at 16 U.S.C. § 160i is not inconsistent with 36 C.F.R. § 5.3. (R. at 68-9). Since application of undisputed facts to a statute or regulation is a question of law, this Court's standard of review is de novo. United States v. Brummels, 15 F.3d 769, 771 (8th Cir. 1994).

**I. The National Park Service regulation which prohibits carrying passengers for hire within Voyageurs National Park without an exclusive permit violates the guaranty of free and open navigation of boundary waters contained in the Webster-Ashburton and Root-Bryce Treaties and discriminates against the petitioner Armstrong because he as a Canadian citizen with a Canadian vessel is ineligible for the permit.**

16 U.S.C. § 160i of the Voyageurs National Park Act specifically reaffirms the protections of the Webster-Ashburton Treaty of 1842 and the Root-Bryce Treaty of 1909. See, 16 U.S.C. § 160i. These treaties unambiguously provide for the "free and open" navigational use of the border waters here in question to the citizens of both countries. See, Webster-Ashburton Treaty, 1842, 8 Stat. 572, 574 (1842); Root-Bryce Treaty, 1909, 36 Stat. 2448, 2449 (1909). While a lower court, in State of Minnesota by Alexander v. Block, 660 F.2d 1240 (8th Cir. 1981), cert. denied, 431 U.S. 939 (1982), has previously held that these treaties do not prevent either country from enacting reasonable non-discriminatory regulations along the waters on their respective side, the application of 36 C.F.R. § 5.3, as applied to Armstrong and Brown, is discriminatory since the regulation produces a monopoly on tour boat operations within the park and forecloses Canadian tour boat operators from traveling on the U.S. side of Rainy Lake. The regulation also conflicts with the treaty right of free navigation. Since the regulation conflicts with language of the treaties and, as such, conflicts with the Voyageurs National Park Act at 16 U.S.C. § 160i, Armstrong's conviction should be reversed.

Voyageurs National Park was created by Act of Congress on January 8, 1971. Voyageurs National Park Act, P. L. 91-661, 84 Stat. 1970 (codified as amended at 16 U.S.C. § 160, 160a to 160k). In Section 304 of the Act, Congress provided

that the park would in no way interfere with any provisions of existing treaties between the United States and Great Britain or the United States and Canada. 16 U.S.C. § 160i. Specifically, Section 160i of the Act states:

> Nothing in this subchapter shall be construed to affect the provisions of any treaty now or hereafter in force between the United States and Great Britain relating to Canada or between the United States and Canada, . . . which by its terms would be applicable to the lands and waters which may be acquired by the Secretary hereunder. . . .

16 U.S.C. § 160i.

In this case, there are two treaties that guarantee the right to free and open navigation to citizens of both the United States and Canada. The first is the Webster-Ashburton Treaty of 1842. 8 Stat. 572 (1842). The second is the Root-Bryce or "Boundary Waters" Treaty of 1909. 36 Stat. 2448 (1909).

Article II of the Webster-Ashburton Treaty of 1842 states:

> It being understood that all the water communications and all the usual portages along the line from Lake Superior to the Lake of the Woods, and also Grand Portage, from the shore of Lake Superior to the Pigeon River, as now actually used, shall be free and open to the use of the citizens of both countries.

8 Stat. 572, 574 (1842),

The Root-Bryce Treaty of 1909, Article I, further provides that:

> The high Contracting Parties agree that the navigation of all navigable boundary waters shall forever continue free and open for the purposes of commerce to the inhabitants and to the ships, vessels, and boats of both countries equally, subject, however, to any laws and regulations of either country, within its own territory, not inconsistent with such privilege of free navigation and applying equally and without discrimination to the inhabitants, ships, vessels, and boats of both countries.

36 Stat 2448, 2449 (1909).

This Court's most recent exposition on the treaties was in the context of the Boundary Waters Canoe Area Wilderness Act. Block, 660 F.2d at 1257. In Block, this Court found that Section 4 of the Boundary Waters Canoe Area Wilderness Act, which restricted motorized boat use, was not in conflict with the above cited treaties which also were incorporated in the Boundary Waters Canoe Area Wilderness Act at Section 17. Id. at 1259. However, contrary to the Government's position and the lower courts' decisions, Block does not control with respect to the treaty issue in this case.

Judicial review of the treaty issue in Block focused on Section 4 of the Boundary Waters Canoe Area Wilderness Act of 1978 and whether that section of the statute was in conflict with the mandates of the treaties. Id. at 1257. The Block Court's decision in "harmonizing" the treaties with Section 4 was based, in large part, on the Court's attempt to avoid having to find that Congress implicitly had abrogated the treaties by this new legislation. Id. at 1258, nt. 45.

The Block Court also found compelling the fact that Section 4 of the Boundary Waters Canoe Area Wilderness Act restricting motorized use was enacted by Congress simultaneously with Section 17 incorporating the treaties.

This, the court reasoned, showed Congress' belief that Section 4 was not in conflict with the treaties. Id.

The treaty issue in this case is much different than that presented in Block. Most importantly is the fact that we are dealing with a National Park Service regulation instead of a portion of the Boundary Waters Canoe Area Wilderness statute as was the case in Block. See Block at 1258. Thus, this Court does not have the same problem of reconciling a statute with the treaties as did the Block court. Id. Rather, this case must focus on the regulation and whether it conflicts with the Voyageurs National Park Act.

Since it is the National Park Service's regulation, 36 C.F.R. § 5.3, as applied to commercial tour boat operators which we challenge as being in violation of the Voyageurs National Park Act, judicial review is governed by the principles of Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

36 C.F.R. § 5.3, as it is applied to commercial tour boat operators, is much different than the restrictions at issue in Block. Section 4 of the Boundary Waters Canoe Area Wilderness Act only restricted motorized boats in certain areas within the wilderness areas. Block, 660 F.2d at 1246. This statutory restriction applies evenly to citizens of both the U.S. and Canada. Id at 1258-59. The court also found quite compelling that Canada was imposing counterpart restrictions on its side of the border in the Quetico National Park adjacent to the Boundary Waters Canoe Area Wilderness. Id.

In contrast, 36 C.F.R. § 5.3, as applied to commercial tour boat operators in Voyageurs National Park, completely forecloses a certain group of people from traveling through waters freely and openly--tour boat operators from Canada such as Armstrong. This is true both because only one permit is issued and because Armstrong, as a Canadian citizen with a Canadian vessel, is not able to pick up and land passengers in the United States as required by the permit.

The permit requires the concessionaire to dock at an American port (the National Park Headquarters) and transport passengers to other land ports within the geographic boundaries of the park (e.g., the Kettle Falls Hotel or Anderson Bay). In other words, the permit requires "port to port" transportation within the United States. However, Canadians are banned from engaging in this type of transportation by the provisions of the Jones Act, 46 U.S.C., § 289, which provides that "no foreign vessel shall transport passengers between ports or places in the United States either directly or by way of a foreign port, under a penalty of $200 for each passenger so transported and landed." This, in addition to Coast Guard and alien work permit regulations, result in both Armstrong and his vessel being discriminated against by the park regulation in clear violation of the right under the Root-Bryce Treaty of "...free navigation applying equally and without discrimination to the inhabitants, ships, vessels, and boats of both countries."

Unlike as in Block, this prohibition against tour boats as applied here has nothing to do with any counterpart "non-motorized" Canadian regulation as was the case in Block. See Block, 660 F.2d at 1258. To the contrary, evidence adduced at trial clearly shows that the Canadian government allows U.S. tour boats to travel into the Canadian waters of Rainy Lake. (Tr. at 179-81). Thus, U.S. tour boats are free to go into Canadian waters of Rainy Lake but Canadian tour boats are not allowed into American waters. This is quite different than the situation which the Block Court found quite compelling, i.e., that there were restrictions on motorized use on both sides of the border. Id.

The Block line of cases also focuses on the nature of the area there as canoe country and stresses that travel by this traditional form of travel is preserved to citizens of both countries by the regulations in the Quetico and in the Boundary Waters Canoe Area Wilderness, National Assn. of

Property Owners v. U.S., 449 F.Supp. 1223,1270 (1980). Rainy Lake, however, has been a commercial highway for large motorized water-borne vehicles as a matter of history for a century, much different from the Boundary Waters Canoe Area Wilderness. (Tr. 216, 255-56).

Finally, Armstrong submits that Block is simply wrong in its interpretation of the treaties in question, particularly as applied here. The Voyageurs National Park Act preserves the strict language of the treaties. 16 U.S.C § 160i. Congressional intent as embodied in the record preserves the treaties particularly as they pertain to the waters. Cong Rec.— Senate December 22, 1970, p. 43249.

It also appears there is an apparent portion of the Root-Bryce Treaty that has been rather overlooked by all the reviewing courts over the years. Based upon the language in Article I of the Treaty, not only does the regulation have to be non-discriminatory, but it also cannot be "inconsistent with such privilege of free navigation." 36 Stat. 2448, 2449 (1909) (emphasis added). Free and open navigation refers to the accessibility of the border waters. See Indiana Port Comm'n., 534 F.Supp. at 869.

Even if this Court were to view 36 C.F.R. § 5.3 as applied to this case as non-discriminatory, it still conflicts with the Treaty of 1909 since it is clearly inconsistent with the concept of free navigation on these boundary waters as it has been applied for centuries. In other words, even if a regulation is non-discriminatory, it still must be consistent with the privilege of free navigation. It is an exercise in imagination and creativity to suggest that this regulation as applied to Armstrong does not wrongfully interfere with his rights to "free and open navigation" for the purposes of commerce guarantied by the treaties.

The Government has argued in the courts below that even if 36 C.F.R § 5.3 conflicts with the treaties, the regulation controls and overrules the Treaties since it is a more recent

statement of law. (R. at 26). The Government, in support of this argument, attempts to bootstrap the regulation onto its enabling legislation at 16 U.S.C. § 1a-2(h), which was enacted after the Voyageurs National Park Act. (R. at 26, 135-36).

The Government's reasoning on this point is flawed on two grounds. First, the Government contends that the regulation itself can serve to abrogate a treaty. While it may be true that a later enacted statute may have such effect, the Government cites no authority, nor does any exist, to support this proposition for an agency-created regulation.

Second is the application of general statutory construction that specific language takes precedence over the general language. See Radzanower v. Touche Ross & Co., 426 U.S. 148, 153, 96 S. Ct. 1989, 1992-93, 48 L.Ed.2d 540 (1976) (stating that a statute which is specific and precise to a subject is not overruled or abrogated by a later statute which is more generalized in nature).

In this case, the Voyageurs National Park Act is the specific legislation. It is the specifics at Sections 160f and 160i which mandate that the National Park Service not regulate Voyageurs contrary to the Treaties, See 16 U.S.C. § 160f, 16 U.S.C. § 160i; whereas, 16 U.S.C. § 1a-2(h) is the National Park Service's general grant of authority to regulate all parks. The Government's argument that 36 C.F.R. § 5.3, through its enabling statute, 16 U.S.C. § 1a-2(h) abrogates the provisions of the Treaties and the Voyageurs National Park Act is thus without merit. It is incorrect to assert that a regulation and an agency that derives its authority from a specific enabling act can later then render meaningless the specific language of that act and the clear intent of Congress by relying on a more general act which governs all national parks.

**II. The National Park Service does not have jurisdiction or authority to enforce C.F.R. § 5.3 on the waters within Voyageurs National Park.**

The State of Minnesota has specifically reserved to itself jurisdiction over the waters within Voyageurs National Park. Minnesota Statute § 84B.061. For purposes of brevity and non-duplication, the petitioner Armstrong otherwise incorporates by reference the arguments of the petitioner Carl Brown on this issue.

## CONCLUSION

Since 36 C.F.R. § 5.3 conflicts with the provisions of the Webster-Ashburton Treaty and the Root-Bryce Treaty, it conflicts with the Voyageurs National Park Act. The regulation interferes with the petitioner Armstrong's right to free navigation of Rainy Lake, and it discriminates against Canadians and Canadian vessels. Further, the issues presented are recurrent and affect important treaty rights guarantied to the citizens of both countries regarding the international boundary waters within Voyageurs National Park. Therefore, the petitioner Armstrong respectfully requests that the petitioner's petition for certiorari be granted.

Dated this 8th day of December, 1999.

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UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

FIFTH DIVISION

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UNITED STATES OF AMERICA,

Violation Notice P006608

Plaintiff,

vs.

CARL E. BROWN,

Defendant.

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UNITED STATES OF AMERICA,

Violation Notice P006607

Plaintiff,

vs.

HAROLD M. ARMSTRONG,

Defendant.

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These matters were consolidated for trial and came on before the undersigned, a Part-time United States Magistrate-Judge, on December 10 through 11, 1997, at the Koochiching County Courthouse in International Falls, Minnesota. Appearing for the United States was Clifford Wardlaw, Esq., Assistant United States Attorney for the District of

Minnesota. Defendant Carl E. Brown appeared personally and through his counsel, Todd S. Welch, Esq., of Denver, Colorado. Defendant Harold M. Armstrong appeared personally and through his counsel, Charles H. LeDuc, Esq., of International Falls, Minnesota.

Based on the testimony and exhibits received at trial, the oral and written arguments of counsel, the file, and all of the proceedings herein, the Court makes the following Findings and Order:

## FINDINGS

Pursuant to the facts found and the reasoning offered in the attached Memorandum, the Court finds the above-named defendants each guilty of conducting commercial operations on the waters of the Voyageurs National Park on August 10, 1996, in violation of 36 C.F.R. § 5.3.

## ORDER

1. The defendants shall appear before the undersigned for sentencing on the 17th day of June, 1998, at the Koochiching County Courthouse in International Falls, Minnesota.
2. At least one week prior to the sentencing date, counsel for the parties shall serve upon opposing counsel and file with the Court any written sentencing argument they may wish the Court to consider, speaking to the following questions:
    a. May the Court impose as an incident of sentence the obligation to pay witness fees and expenses necessarily incurred by the United States Government in the trial of these matters?
    b. May the Court stay or suspend execution of any part of any sentence imposed on these matters upon the

condition of the defendants' exclusion from the lands and waters of the Voyageurs National Park for a determinate period of time?

DATED this 27th day of April, 1998.

/s/

Randall R. Burg
United States Magistrate-Judge
(Part-time)

## MEMORANDUM

Carl Brown continues to challenge the authority of the National Park Service over the waters within the exterior boundaries of the Voyageurs National Park. The fight is now in its third decade. Brown's ally in this round of the struggle is Harold "Bo" Armstrong, a citizen of Canada.

On August 9, 1996, Brown and Armstrong announced their common intention to traverse Voyageurs National Park by water in their respective tour boats. Each would carry paying passengers. Both would leave from points outside the park and then cruise through the park for ultimate destinations outside the park. The trip took place the following day. Neither defendant had a permit from the National Park Service to operate a tour boat within the park.

Once inside the park's boundaries, defendants' boats were stopped by park rangers. The tour boat passenger manifests were seized. Brown and Armstrong were each issued a citation for violating 36 C.F.R. § 5.3. That regulation prohibits conducting a business operation in a park area without a permit.

Brown, as he has in the past, challenges the existence of any National Park Service jurisdiction over the waters inside the Voyageurs National Park. He denies that there was ever any cession of state jurisdiction over those waters to the federal government in connection with the park's creation.[1] In his view, the statutory and regulatory enactments of Congress and the Department of the Interior lack any fundamental jurisdictional basis, at least as they purport to limit commercial activities on waters within the park.

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[1] There is no question that the State of Minnesota ceded ownership and jurisdiction over land within the park's boundaries. See: Minn. Stat. § 84B.03, subd. 1.

In addition, Brown and Armstrong defend their tour boat operations as an exercise of commercial fights guaranteed under two international treaties: The Webster-Ashburton Treaty of 1842, and the Root-Bryce Treaty of 1909. Those treaties' broad protections cannot, they believe, be undermined by mere administrative agency regulation.

## DISCUSSION

In 1977, the United States Court of Appeals for the Eighth Circuit rejected Brown's first attack on the regulatory authority of the National Park Service over the waters in the Voyageurs National Park. U. S. vs. Brown, 552 F.2d 817 (hereafter "Brown I"). In so doing, that Court also rejected a significant part of the legal analysis of United States District Judge Miles Lord, who first reviewed the case.

Judge Lord had concluded, as a matter of fact and law, that the State of Minnesota had not ceded any jurisdiction over the waters within the park at the time of its creation: "This Court agrees that Minnesota has not ceded jurisdiction over the waters to the United States." U. S. vs. Brown, 431 F. Supp. 56 (1976). The Court of Appeals, however, reached precisely the opposite conclusion on this question. The Court of Appeals found an implied general cession of state jurisdiction over both the lands and the waters within the park's boundaries. That implied cession was inherent in Minnesota's capitulation to Congressional insistence that all hunting be banned within the proposed national park:

> [T]he state's active participation in the creation of Voyageurs Park with the knowledge that Congress intended that hunting be prohibited throughout the park was tantamount[2] to a cession of jurisdiction

[2] "Tantamount": Equivalent as in value, force, effect, or signification. To amount to as much itself. From the Italian tanto montare: To amount to

> over the lands and the waters within the park boundaries. Brown I at 821 (emphasis added).

The remainder of the Court of Appeals' opinion in Brown I presented an alternative justification of the federal hunting ban based on the Property Clause of the United States Constitution (Article IV, Section 3, Clause 2). That Property Clause analysis proceeded from the Court's forensic assumption that the jurisdictional finding it had just made was wrong:

> Assuming arguendo that the state did not cede jurisdiction over the waters in the park, we further conclude that the federal regulations prohibiting hunting in Voyageurs Park were a constitutional exercise of congressional power under the Property Clause. Brown I at 821.

In its alternative holding, the Appeals Court upheld the hunting ban as a valid, albeit extraterritorial, exercise of Property Clause power over non-federal waters undertaken to protect federal park lands. The Court relied upon the then recent U. S. Supreme Court case, Kleppe v. New Mexico, 426 U.S. 529 (1976), to provide the analytical underpinnings for its alternative holding. Brown I at 821-823.

Approximately two months later, the United States Supreme Court denied Brown's petition for a Writ of Certiorari. 97 S. Ct. 2666 (May 31, 1977).

Because of the Eighth Circuit's alternative holdings in Brown I, Carl Brown has understandably concluded that the legal significance of that case is unclear, and may fairly be construed to be limited in authority to the specific regulation

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as much. Random House Dictionary of the English Language (Second Edition--unabridged), page 1942.

at issue in that case. Thus, the ambiguity of the Court of Appeals' position on the nature and extent of Minnesota's cession of jurisdiction has spawned 21 years of continuing uncertainty and controversy. It has prompted off-setting efforts on all sides to buttress or to undermine the legal foundations of the implied cession of jurisdiction declared in Brown I. Those efforts have become more blatant since this Court ruled on Brown's last challenge in 1994.[3]

In the ensuing 1995 legislative session, the Minnesota State Legislature passed Laws, 1995 c. 124 (now codified as Minn. Stat. § 1.0451 and § 84B.061). That enactment asserted that the State never ceded to the United States, either expressly or implicitly, its ownership of and jurisdiction over the navigable waters within the Voyageurs National Park.[4]

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[3] A copy of the Order and Memorandum dated March 29, 1994, is attached hereto as Appendix I.

[4] Of the scores of members of the Minnesota House and Senate in 1995, only five were then serving who had also been Minnesota legislators when the enabling legislation for the Voyageurs National Park was passed in 1971: Senator Roger Moe (now Senate Majority Leader); Senator Florian Chmielewski (now retired); District 3A Representative Irv Anderson of International Falls (1995 Speaker of the House of Representatives and author of H.F. 54, which became Laws 1995 c. 124); Representative James Rice (since deceased); and, Representative Willard Munger of Duluth (Minnesota's longest-serving legislator, presently in his 42nd year of service). Compare Laws 1971, Volume 1, pages xi-xv, with Laws 1995. It is these individuals, presumably, who could speak with authority in 1995 regarding the 1971 Minnesota Legislature's intent regarding cession of exclusive jurisdiction within the proposed Voyageurs Park. However, of these men, only Moe, Chmielewski, and Anderson voted for H.F. 54. Representatives Munger and Rice cast no vote on the measure. The House vote on H.F. 54 was 96 to 31; the Senate vote was 44 to 22. See: 1995 Journal of the Minnesota Senate, pages 2789-2790, and 1995 Journal of the Minnesota House of Representatives, page 2052.

There was a sixth individual who had been a Minnesota legislator in 1971 who could have played a meaningful role in 1995 in enunciating the 1971 legislature's intent. In 1971, Arne Carlson was representing District 36 in the Minnesota House. See: Laws 1971, page xiii. In 1995, Arne Carlson

The legislation went on to charge the governor, the attorney general, other constitutional officers, and other public officials, such as the Commissioner of Natural Resources, to "vigorously assert and defend, in all forums, the State's ownership and jurisdiction over these waters." Finally, the legislation specifically directs the attention of those state officials to the "free rights of travel" under the same treaties Brown and Armstrong plead in their defense here.

The Department of the Interior has not been idle either. In 1995-1996, the National Park Service promulgated amendments to "clarify" its general regulations applicable to navigable waters within park boundaries. In the preamble to those amendments, the Park Service staked out its claim of general regulatory authority over navigable waters within park boundaries. It said:

> ...[F]ederal authority to regulate within the ordinary reach of these waters is based on the commerce and property clauses of the United States Constitution, not ownership. Like the United States Coast Guard, NPS exercises authority over navigable waters irrespective of ownership....[5] 61 F.R. 35133, 35134 (1996).

All of these conflicting state and federal efforts to assert claims of jurisdictional authority find their roots in the Eighth

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was the Governor of the State of Minnesota. As Governor, he let H.F. 54 become law without his signature on May 11, 1995. See: Laws, 1995 c. 124.

Thus, the capacity of the 1995 Minnesota Legislature to clarify or even speak to the intent of the 1971 Minnesota Legislature seems, as a matter of fact, uncertain at best.

[5] It is worthwhile to note that Brown has always recognized the authority of the Coast Guard on the waters within Voyageurs Park.

Circuit Court of Appeals' unwillingness to deliver one clear jurisdictional holding in Brown I. If the jurisdictional issue is ever clearly and unqualifiedly resolved, there may be an end to Brown's challenges; if it is not, there will never be an end to those challenges.

This Court, therefore, begins analysis of the present case from the first principle that the United States acquired jurisdiction over the waters within the Voyageurs National Park in 1971 through an unexpressed, but actual, cession of jurisdiction by the State of Minnesota. That is what the Eighth Circuit Court of Appeals concluded in Brown I, and this subordinate court is bound by that conclusion, however tentatively it was expressed in 1971.[6]

The National Park Service is the administrative agency that the Congress has charged with the responsibility of regulating the lands and waters of the Voyageurs National Park. That authority is to be exercised according to policies and principles common to all national parks. It is also to be exercised to accomplish the specific purpose for which the Voyageurs National Park was created. 16 U.S.C. § 160.

Among the general regulatory powers granted by Congress to the National Park Service is the authority to regulate commercial providers of accommodations, facilities, and services within national parks. 16 U.S.C. 20. The Park Service does so through the issuance of a limited number of permits and concessions. It so limits commercial activity because Congress has found that the unregulated conduct of commercial operations within national parks would impair the fundamental purpose of all national parks: "The conservation of scenery, wildlife, national and historic objects" in order to

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[6] In any event, it certain that the present judges of the Eighth Circuit Court of Appeals will have an opportunity to restate clearly or renounce utterly the jurisdiction holding in Brown I when they review the present case.

provide "for their enjoyment in a manner that will leave them unimpaired for the enjoyment of future generations." Id.

Brown and Armstrong had no permit to conduct tour boat operations on the waters of Voyageurs National Park on August 10, 1996. They are, therefore, guilty of violating 36 C.F.R. § 5.3.

The provisions of the Webster-Ashburton Treaty of 1842 and the Root-Bryce Treaty of 1909 do not alter the Court's conclusion that Brown and Armstrong are property convicted of a violation of 36 C.F.R. § 5.3. Those treaties, which relate to the boundary waters common to the United States and Canada, do not preclude each signatory sovereign from subsequently enacting regulations governing their own nation's waters and the activities thereon, so long as those regulations apply evenhandedly both to their own and the other signatory's nationals. U. S. v. Block, 660 F.2d 1240 (8th Cir. 1981). That Brown and Armstrong's stand in the dock together is the clearest proof of such nondiscriminatory enforcement of law.

## CONCLUSION

The past efforts of this Court have not extinguished the legal controversy surrounding National Park Service authority over the waters in the Voyageurs National Park. As noted, the 1994 decision may merely have "heaped coal on the fire."

It will require an unequivocal decision of the Eighth Circuit Court of Appeals on the jurisdictional question if the controversy is ever to be brought to an end. Meanwhile, this Court has the same hope it held four years ago: That whatever the course of the controversy, the beauty and value of the Voyageurs National Park not be harmed or diminished.

R.R.B.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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UNITED STATES OF AMERICA,

Plaintiff,

vs.

CARL E. BROWN,

Defendant.

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Violation Notice
P363422

**ORDER AND JUDGMENT**

This matter came on before the undersigned, a part-time Magistrate-Judge for the District of Minnesota, on defendant's Motion to Dismiss. The defendant appeared personally and through his counsel, Charles H. Le Due, Esq., of International Falls, Minnesota. Appearing for the United States of America was Friedrich A. P. Siekert, Esq., Assistant United States Attorney. Based an the Stipulation of Facts, the affidavits and exhibits of record, the written and oral arguments of counsel, and all the files and proceedings herein, the Court makes the following Order and Judgment:

1. That defendant's Motion to Dismiss be, and hereby is, denied.

2. Pursuant to paragraph 9 of the Stipulation of Facts, the Court adjudges the defendant guilty of the offense alleged in Violation Notice P363422.

3. Defendant may post $50.00 collateral by May 3, 1994, for forfeiture in lieu of further appearance in relation to sentencing in this matter on that date. Proof of timely filing of an appeal in this matter, together with the posting of a

certified check or money order in the amount of $50.00 will stay final forfeiture of that collateral pending final determination of the appeal.

DATED this 29th day of March, 1994.

/s/
Randall R. Burg
U. S. Magistrate Judge
(Part-time)

## MEMORANDUM

Defendant Carl Brown is charged with a violation of 36 C.F.R. § 5.3. The matter comes before the Court on defendant's Motion to Dismiss. The parties have stipulated to various facts and evidence. It has been further agreed that should the Court deny Brown's motion, "that he is subject to a finding of guilty and the imposition of a fine and/or other penalties...." Stipulation of Facts, paragraph 9.

## BACKGROUND

For the past 18 years, Carl Brown has fought to eliminate what he sees as illegal federal regulation of the waterways within the Boundary Waters Canoe Area and the Voyageurs National Park. Mr. Brown seeks to continue the tradition of water-borne commerce begun over 300 years ago on these lakes and rivers by French trappers and traders.

At issue in this case is the regulation of the National Park Service prohibiting unauthorized business operations "in park areas." 36 C.F.R. § 5.3. Mr. Brown does not dispute that he violated the regulation by operating an excursion boat business in park areas without a permit. Stipulation of Facts, paragraph 5. Rather, he attacks the legal foundations of the regulation on three grounds.

First, he maintains that the United States never acquired jurisdiction over these waters from the State of Minnesota. Second, he argues that the regulation conflicts with and must, therefore, yield to the provisions of two treaties: The Webster-Ashburton Treaty of 1842 and the Root-Bryce Treaty of 1909. Finally, Brown characterizes the regulation as an unreasonable, overbroad, and, therefore, illegal exercise of authority under the Property Clause of the United States Constitution.

## JURISDICTION

Mr. Brown mounted his first unsuccessful challenge to National Park Service authority over the waters within Voyageurs National Park over 18 years ago. United States v. Brown, 431 F. Supp. 56 (1976). Then, as now, Brown argued that the State of Minnesota never ceded its sovereignty over the waters within the park to the United States. That Brown raises the same argument again now is, in a way, not surprising. By the language and structure of its decision on Brown's first challenge, the Eighth Circuit Court of Appeals seemed to leave lingering questions on the sovereignty issue. United States v. Brown, 552 F.2nd 817 (1977).

The Court of Appeals' legal analysis in Brown I case began with a frank concession: "In this case, it is not abundantly clear that the State of Minnesota ceded jurisdiction over the waters of the park to the United States." Id. at 820. In fact, that Court went further and acknowledged: "The State of Minnesota did not expressly cede jurisdiction over the waters of the park to the United States. Id. at 821 (emphasis added).

The Court of Appeals concluded, nevertheless, that the State of Minnesota had, by implication and operation of law[1], completely ceded its sovereign jurisdiction over all uses of the waterways within the park. Minnesota had done so by capitulating to a Congressional ultimatum regarding hunting within the park.

The bill first offered in Congress to authorize the park had preserved both waterfowl and big game hunting as authorized park uses. See, Exhibit 7 to defendant's initial

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[1] "Operation of law. The term expresses the manner in which rights, and sometimes liabilities, devolve upon a person by the mere application to the particular transaction of the established rules of law, without the act or co-operation of the party himself." Black's Law Dictionary (Fifth Edition), page 985.

memorandum. The Secretary of Interior, as well as the House subcommittee to which the legislation was referred, rejected this part of the bill. The State of Minnesota was presented with a choice: a national park without hunting or no national Park at all. The hunting provision was deleted. The State proceeded with land transfers for the park pursuant to Minnesota Statutes Chapter 1.

From the particular legislative history of the hunting controversy, the Court of Appeals reached a very broad conclusion. That conclusion disposed of Minnesota's sovereign jurisdiction over the use of waterways within the park:

> The state's active participation in the creation of Voyageurs Park with the knowledge that Congress intended that hunting would be prohibited throughout the park was tantamount to a cession of jurisdiction over the lands and waters within the park boundaries. Id. at page 821.[2]

The Court of Appeals immediately buttressed its broad finding of an implied cession of sovereignty with an alternative holding:

> Assuming arguendo that the state did not cede jurisdiction over the waters in the park, we further conclude that the federal regulations prohibiting hunting in Voyageurs Park were a constitutional

[2] The Court of Appeals' conclusion of an implied cession of state sovereignty to the federal government in Brown I should be contrasted with that same Court's rigorous view of the express prerequisites to a federal cession of sovereignty to a state. See, for example, Citizens and Landowners Against the Miles City/New Underwood Powerline v. United States, 683 F.2d 1171 (8th Cir. 1982).

exercise of congressional power under the Property Clause. Id.

This alternative holding has invited further litigation by Brown on the sovereignty question.

In the present case, Brown seeks to have the sovereignty analysis in Brown I confined to the one use (hunting) actually presented in the facts of that case. So to limit Brown I's holding would be completely consistent with logic, but at odds with the legal principle of stare decisis. However suspect the reasoning of Brown I, that case squarely held that the State of Minnesota had ceded jurisdiction over the lands and waters within the park boundaries. That the Court of Appeals immediately invoked the Property Clause as an alternative justification for the hunting prohibition at issue there, did not alter or limit the sweeping legal conclusion on sovereignty.

In United States v. Title Insurance and Trust Company, the United States Supreme Court succinctly set forth the legal effect of an alternative ruling by an appellate court:

> ...where there are two grounds upon either of which an appellate court may rest its decision, and it adopts both, 'the ruling on neither is obiter, but each is the judgment of the court, and of equal validity with the other.' 65 U.S. 472, 44 S. Ct. 621 (1924) at 486, 623.

This Court is bound to obey the sovereignty decision of the Eighth Circuit Court of Appeals in Brown I. This is not so simply because of this Court's subordinate rank in the hierarchy of the an Act of Congress, is at issue here does not alter the Court's conclusion. 36 C.F.R. § 5.3 was promulgated years after the treaties and years before the creation of Voyageurs National Park. At the park's creation, Congress

specifically directed the Secretary of Interior to administer the park in accordance with prevailing regulatory authority, including 36 C.F.R. § 5.3. Public Law 91-661, § 301(a). Congress did so knowing that the Interior Department strongly emphasized preservation over commercial exploitation of national park resources:

> If an area is to be accorded the dignity and stature of designation as a national park, then many... commercial uses...must be subordinated to the larger achievement of preservation. Letter of Walter J. Hickel, Secretary of Interior, to Honorable Wayne N. Aspinall, Chairman, House Committee on Interior and Insular Affairs (May 27, 1970).

## THE PRIVATE INTERESTS OF MR. BROWN AND THE PUBLIC INTEREST OF THE UNITED STATES

Article IV, Section 3, Clause 2, of the United States Constitution states:

> Congress shall have Power to...make all needful Rules and Regulations respecting Property belonging to the United States.

The United States has acquired jurisdiction over the lands and waters in the Voyageurs National Park. Brown I, supra. Brown recognizes certain forms of federal regulatory authority in these waters: the United States Coast Guard, the Customs Service, and the Immigration and Naturalization Service. See: Brown letter brief of May 28, 1993, page 2. Brown, however, rejects the broad authority of the National Park Service to regulate commercial enterprise in the Voyageurs National Park. Id. page 3. The exercise of that

authority has imposed strict limits on commercial access to the park's waterways, and to the tourists who will pay to see them. Brown believes that 36 C.F.R. § 5.3, as applied here, arbitrarily deprives him of an historic right to engage in commerce on these waters:

> The National Park Service should not be granted the power to regulate commerce in these waters in the manner it is attempting to do so in this case...The National Park Service is not the proper party or power to regulate commerce or navigation and has no business attempting to do so under the facts and circumstances of this case...The government's argument would permit the Park Service to regulate a commercial activity everywhere inside a 219,000 acre park without any kind of specific showing that particular areas of park land would be adversely effected by the regulatory activity. This decision expressly includes 80,000 acres of lakes, and attempts the regulation in the face of three centuries of use commercial to the contrary, on the water. Defendant's letter brief (May 28, 1993), page 3;6.

In essence, Brown's claim is that 36 C.F.R. § 5.3 deprives him of a substantive right to engage in the excursion boat business without due process of law.

In the early years of this century, the doctrine of substantive due process was frequently invoked to block regulatory "interference...with the ordinary trades and occupations of the people." Lochner v. New York, 198 U.S. 45 (1904) at 63. Since the mid-1930s, however, a different view has prevailed. It is now well established that the federal government may properly promote the public welfare by laws and rules regulating business activity. Congressional regulatory authority has been broadly delegated to an

increasing number of administrative agencies. It is not unusual for several federal agencies to have separate and concurrent authority over a particular commercial activity. In assessing the legality of such federal regulatory efforts, courts must accord broad deference to the judgments of both Congress and the administrative agencies Congress has created and empowered. This is particularly so when that federal authority regulates activity occurring on federal property:

> The guarantee of due process...demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. Nebbia v. New York, 201 U.S. 502 (1934) at 525.

Congress expressly declared its purpose in creating Voyageurs National Park:

> The purpose of this act is to preserve for the inspiration and enjoyment of present and future generations, the outstanding scenery, geological conditions, and waterway system which constituted a part of the historic route of the Voyageurs.... Public Law 91-661.

To accomplish this appropriate purpose, Congress directed the Secretary of Interior to administer the park in accordance with 16 U.S.C. 1-4.

16 U.S.C. 1-2(h) empowers the Secretary of Interior to "promulgate and enforce regulations concerning...activities on or relating to waters within areas of the National Park System." Pursuant to that authority, the Secretary has limited the number and operations of commercial excursion boats

within the park. The reasons for these regulations are set out in paragraphs 8-11 of the Affidavit of Chief Ranger Bruce McKeeman.

Chief Ranger McKeeman's affidavit details the National Park Service's reasons for limiting excursion boat operations to approved concessionaires: to promote passenger safety; to assure reliable service, and; to maintain high quality standards. Most importantly, the regulation of commercial operations reduces the risks to the park's natural resources (i.e., wildlife, geologic features) inherent in unlimited market access and unrestricted competition.

It may be true that the general congressional policy of preservation could be as well-served in Voyageurs by less stringent or park-specific commercial regulations. Even if true, regulatory changes cannot and will not be compelled here. There is a legitimate federal interest in preserving the waterways of the Voyageurs National Park from unregulated and indiscriminate use. 16 U.S.C. 20. The means adopted, pursuant to 36 C.F.R. § 5.3, bear a reasonable relation to the accomplishment of that purpose. The Court's inquiry into less-restrictive alternatives ends there:

> The government is under no obligation to adopt the least restrictive alternative...rather, the government interest and the regulations sought to be enforced must have la fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition, but one whose scope is in proportion to the interest served.' Washington Tour Guides v. National Park Service, 808 F. Supp. 877 (D.D.C. 1992), quoting Board of Trustees of the State University of New York v. Fox, 492 U.S. 469 (1989) at 480.

## CONCLUSION

Much has changed since Mr. Brown's first challenge to the Park Service's authority in the Voyageurs National Park. The policy of preservation so dominant in the 1970s is now pressed hard by the economic concerns of the 1990s. New judges sit on the Eighth Circuit Court of Appeals. Brown's State Senator and State Representative currently occupy powerful positions in the Minnesota Legislature. They have previously sought to intervene in this action, and may renew that effort. All these facts and others may produce significant legal changes as this case goes forward. It is this Court's sincere hope that any such changes will not work to diminish the value and beauty of Minnesota's singular contribution to the National Park System.

R.R.B

**UNITED STATES DISTRICT COURT**

**DISTRICT OF MINNESOTA**

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UNITED STATES OF AMERICA,

Plaintiff,

Criminal No. 98-145
(JRT/RRB)

v.

**ORDER**

(1) HAROLD M. ARMSTRONG, a/k/a "Bo,"
and
(2) CARL E. BROWN,

Defendants.

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On April 27, 1998, United States Magistrate Judge Randall R. Burg entered a written order and judgment finding defendants Harold M. "Bo" Armstrong and Carl E. Brown guilty of conducting commercial operations on Rainy Lake within Voyageurs National Park ("VNP"), in violation of 36 C.F.R. § 5.3.[1] Defendants admitted that, on August 9, 1996, they separately traversed waters the Government claims to be part of VNP when park rangers stopped them and issued citations for transporting paying passengers without a permit. Defendants' only submitted defense was that the National

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[1] Section 5.3 provides as follows:

> Engaging in or soliciting any business in park areas, except in accordance with the provisions of a permit, contract, or other written agreement with the United States, except as such may be specifically authorized under special regulations applicable to a park area, is prohibited.

Park Service ("NPS") has no authority over waters within the exterior boundaries of VNP. On July 23, 1998, the Magistrate Judge issued an Order sentencing Brown and Armstrong.[2]

This matter is before the Court on defendants' appeal of the Magistrate Judge's orders.[3] Brown and Armstrong continue to challenge the NPS's jurisdiction over activities on the waters of Rainy Lake, and Brown challenges his sentence. Having reviewed the record in this case and the submissions and arguments of the parties, the Court affirms defendants' convictions and Brown's sentence.

The Court affirms the Magistrate Judge's conclusion that the NPS has jurisdiction over the waters within the boundaries of VNP based on Minnesota's implied cession of jurisdiction over those waters. In *United States v. Brown*, 552 F.2d 817, 821 (8th Cir.) (*"Brown I"*), *cert. denied*, 431 U.S. 949 (1977), a matter involving one of the defendants in this case, the Eighth Circuit held that Minnesota's "active participation in the creation of [VNP] with the knowledge that Congress intended hunting would be prohibited throughout the park was tantamount to a cession of jurisdiction over the lands and the waters within the park boundaries." Although this case involves activities other than hunting, the Court believes that *Brown I*'s strong and clear statement regarding Minnesota's cession of jurisdiction must be construed as establishing that

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[2] The Magistrate Judge sentenced Brown to sixty days incarceration and a $5,000 fine. However, the Magistrate Judge placed Brown on three-year unsupervised probation and stayed the entire period of incarceration and $3,000 of the fine for those three years, unless Brown violated his terms of probation. One of the terms of Brown's probation is that he have no presence in VNP except pursuant to the terms and conditions of any permits for the conduct of commercial operations granted to him by the NPS. Armstrong was sentenced to thirty days incarceration and a fine of $300. His incarceration also was stayed for one year, during which he was placed on unsupervised probation.

[3] Because it finds further argument on the issues presented is unnecessary, the Court denies the defendants' requests for oral argument.

the United States acquired regulatory jurisdiction over the waters within VNP. Accordingly, the NPS - the regulatory agency Congress has charged with regulating the lands and waters of VNP – had jurisdiction under 36 C.F.R. § 5.3 to regulate defendants' commercial activities on the day in question.

The Court finds defendants' various arguments to the contrary are unconvincing. For example, the Court rejects defendants' reliance on Minn. Stat. § 84B.061. That statute was enacted after the *Brown I* decision and cannot operate to alter Minnesota's cession of jurisdiction at the time VNP was created. The Court further rejects defendants' contention that 16 U.S.C. § 160a (VNP's authorizing statute) indicates Congress only wished to exercise authority over the lands within VNP, not its waters. A close reading of the statute reveals otherwise: Congress not only provided that the Secretary of the Interior was to purchase lands from Minnesota to establish VNP, but also stated that the Secretary was to establish VNP after sufficient interests in "lands or waters" were acquired. *See* 16 U.S.C. § 160(a). This reference to interests in waters clearly contemplates acquisition of regulatory jurisdiction over such waters. In addition, defendants' reliance on the Webster-Ashburton Treaty of 1842 and the Root-Bryce Treaty of 1909 is misplaced because neither of these treaties prevents the United States from regulating its own waters, as long as those regulations apply equally to both its and the other signatory's nationals. *See United States v. Block*, 660 F.2d 1240, 1258-59 (8th Cir. 1981), *cert. denied*, 445 U.S. 1007 (1982). Finally, there is nothing in the record that suggests that the NPS citations at issue in this case offend international treaties or agreements, or in any other way exceed the limitations set forth in 16 U.S.C. § 160(i).

Furthermore, as an additional basis for jurisdiction, the Court concludes that the NPS's citation of defendants under

36 C.F.R. § 5.3 was a proper exercise of its jurisdiction under the Property and Commerce Clauses of the United States Constitution. Pursuant to its authority under these clauses, Congress enacted 16 U.S.C. § 1a-2(h), authorizing the NPS to "promulgate and enforce regulations concerning boating and other activities on or relating to waters located within areas of the National Park System, including waters subject to the jurisdiction of the United States...."[4] Enforcement of section 5.3, which provides for the NPS's regulation of commercial boating in VNP, is, in turn, a proper exercise of the agency's authority delegated under § 1a-2(h).[5] Thus, the Court rejects defendants' jurisdictional arguments and affirms their convictions.

The Court also rejects Brown's claim that the Magistrate Judge's sentence constitutes cruel and unusual punishment under the Eighth Amendment. There is no dispute that his sentence is within the applicable range set forth in the Federal Sentencing Guidelines. Contrary to Brown's assertions, this case does not present "extraordinary circumstances" that render his sentence cruel and unusual despite the fact that the sentence falls within the limits prescribed by law. The

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[4] The Court rejects defendants' contention that § 1a-2(h) renders§ 1a-6(e) superfluous. The latter section merely acknowledges the states' concurrent authority to exercise civil and criminal jurisdiction within the National Park System. *See* § 1a-6(e) ("Nothing [contained in this Act] shall be construed or applied to affect any right of a State or a political subdivision thereof to exercise civil and criminal jurisdiction within the National Park Service."). It obviously does not prevent the NPS from exercising jurisdiction.

[5] *See, e.g., Brown I,* 552 F.2d at 822-23 (holding that the regulation at issue in that case was a valid prescription under the Property Clause, "designed to promote the purposes of federal lands within the national park"); *see also Block,* 660 F.2d at 1248-51 (concluding that the regulation of motorboat in the Boundary Waters Canoe Area is a valid exercise of authority under the Property Clause because it protects the purpose for which Congress reserved the land).

Magistrate Judge's sentence is an appropriate and measured response to Brown's actions, particularly in light of his pattern of misconduct. Moreover, Brown's contention that the portion of the sentence forbidding him from conducting commercial ventures into VNP without a permit is unduly burdensome is specious. Like any other person, he must seek a permit to conduct such activities. His response that he cannot seek a permit because the NPS has no jurisdiction to issue such a permit obviously is without merit, given this Court's determination that the NPS possesses such jurisdictional authority.

**ORDER**

Based on the foregoing, and all of the records, files, and proceedings herein, **IT IS HEREBY ORDERED:**

1. Defendants' requests for oral argument [Docket Nos. 37 and 35 respectively] are **DENIED**.

2. The Magistrate Judge's Order dated April 27, 1998 [Docket No. 18], finding defendants guilty of conducting commercial operations on the waters of VNP on August 10, 1996, in violation of 36 C.F.R. § 5.3 is **AFFIRMED**.

3. The Magistrate Judge's Order regarding sentencing dated July 21, 1998 [Docket No. 22] is **AFFIRMED**.

Dated: January 5, 1999.

/s/
JOHN R. TUNHEIM
United States District Judge

**United States Court of Appeals**
**FOR THE EIGHTH CIRCUIT**

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No. 99-1190

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United States of America, *
*
Appellee, *
*
v. *
*
Harold M. Armstrong, *
also known as "Bo," *
*
Appellant. *
*
* Appeals from the United States
* District Court for the
* District of Minnesota.
State of Minnesota; *
*
Amicus on Behalf *
of Appellant, *
*
Voyageurs Region *
National Park Association; *
The Wilderness Society; *
The National Parks and *
Conservation Association. *
*
Amici on Behalf *
of Appellee. *

No. 99-1191

United States of America, *
*
Appellee, *
*
v. *
*
Carl E. Brown, *
*
Appellant. *
*
*
*
State of Minnesota; *
*
Amicus on Behalf *
of Appellant, *
*
Voyageurs Region *
National Park Association; *
The Wilderness Society; *
The National Parks and *
Conservation Association. *
*
Amici on Behalf *
of Appellee. *

Submitted: May 12,1999

Filed: July 28, 1999

Before McMILLIAN, HEANEY, and FAGG, Circuit Judges.

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HEANEY, Circuit Judge.

Carl Brown and Harold "Bo" Armstrong were convicted in the United States District Court for the District of Minnesota for violating a National Park Service (NPS) regulation that prohibits conducting business operations on Rainy Lake in Voyageurs National Park (VNP) without a permit. We affirm their convictions and the sentences imposed, except that the sentence imposed on Carl Brown must be modified on remand with respect to that portion of his sentence that prohibits him from entering VNP for any purpose.

## I. Background

The VNP concept dates back to 1891 when the Minnesota Legislature requested that the President of the United States establish a national park in Minnesota between Crane Lake on the east and Lake of the Woods on the west. See 1891 Minn. General Laws 402-03. Progress was slow, with no significant action occurring on the request until 1960 when the state asked the NPS to study the possibility of establishing a national park within the same area. See S. Rep. No. 91-1513 (1970), reprinted in 1970 U.S.C.C.A.N. 5965, 5966-67. In 1964, the area was recommended for national park designation by the NPS. See id. In 1968, Representative John A. Blatnik introduced enabling legislation to establish VNP in the House of Representatives. The bill died that year but was revived in 1969. See Voyageurs Is First Water-Based Park Duluth News-Tribune, Jan. 24, 1971.

The establishment of VNP was authorized by the Voyageurs National Park bill ("the bill") and made contingent upon the donation by Minnesota to the Secretary of the Interior of some 25,000 acres of state-owned land lying within the boundaries of the 219,000 acre park (comprised of 139,000 acres of land and 80,000 acres of water). See S. Rep. No. 91-1513 (1970), reprinted in 1970 U.S.C.C.A.N. 5965, 5965, 5967. The bill was passed by the House on October 5, 1970, by the Senate with minor changes on December 21, 1970, and received final approval by Congress on December 29, 1970, when the House approved the Senate's changes. See 116 Cong. Rec. 34,798, 34,806, 43,248, 43,773 (1970). Congressman John A. Blatnik of Chisholm, Minnesota, who first introduced the bill in Congress in 1968, was the principal author of the legislation in the House of Representatives and Walter F. Mondale was the principal author in the Senate. The legislation was signed into law as Public Law 91-661 by President Richard M. Nixon on January 8, 1971. See Nixon Signs Voyageurs Park Bill, Duluth News-Tribune, Jan. 9, 1971.

As an active participant in the creation of VNP, the state of Minnesota passed the necessary land donation legislation required to meet the conditions set forth in Public Law 91-661 and otherwise encouraged the development of the park. See Minn. Stat. §§ 84B.01-.10 (1971). That legislation, which donated all state lands within the boundaries of the proposed VNP to the United States for the purpose of creating the park, passed the Minnesota House of Representatives on May 12, 1971, with a 108-26 vote, and the Minnesota Senate on May 16, 1971, on a 49-16 vote. See Einer Karlstrand, Senate Approves Amended Voyageurs National Park Bill, Duluth News-Tribune, May 16, 1971, at 1. On June 4, 1971, Governor Wendell Anderson signed the legislation into state law. See Einar Karlstrand, Voyageurs Bill Signed By Governor, Duluth Herald, June 4, 1971. VNP was officially

established by the Secretary of the Interior on April 8, 1975. See 40 Fed. Reg. 15,921-22 (1975).

VNP lies along the international boundary between the United States and Canada, just east of International Falls, Minnesota. See S. Rep. No. 91-1513 (1970), reprinted in 1970 U.S.C.C.A.N. 5965, 5965. The water portion of VNP is dominated by four large lakes, Rainy, Kabetogama, Namakin, and Crane. See Map, Appendix 1. Those four lakes, along with hundreds of smaller lakes, were gouged out of the landscape by the great ice sheets that shaped this entire region thousands of years ago. Taken together, these lakes and the network of connecting waterways make this region a unique and beautiful setting for a national park. See S. Rep. No. 91-1513 (1970), reprinted in 1970 U.S.C.C.A.N. 5965, 5965. The northern boundary of VNP bisects Rainy Lake and also constitutes the border between the United States and Canada. Most of the dry-land surface of VNP is located on, or near, the Kabetogama Peninsula (103,850 acres), with a remaining portion (35,280 acres) lying within the then-bounded Superior National Forest. See id.

The federal legislation creating VNP memorialized the voyageurs who traversed the land and waters along Minnesota's border with Canada:

> The purpose of this subchapter is to preserve, for the inspiration and enjoyment of present and future generations, the outstanding scenery, geological conditions, and waterway system which constituted a part of the historic route of the Voyageurs who contributed significantly to the opening of the Northwestern United States.

16 U.S.C. § 160 (emphasis added).[1]

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[1] Between 1981 and 1986, approximately 1,060,000 persons visited the park. See NPS Decade Reports, Recreation Visits 1981-1990 (last

Since at least December 29, 1966–some four and one-half years before the state's donation of the land required by Public Law 91-661–an NPS regulation governing business operations with national parks has been in effect:

> Engaging in or soliciting any business in park areas, except in accordance with the provisions of a permit, contract, or other written agreement with the United States, except as such may be specifically authorized under special regulations applicable to a park area, is prohibited.

36 C.F.R. § 5.3 (1998); see 31 Fed. Reg. 16,660, 16,661 (1966) (same).

As of August 10, 1996, the Secretary had given only one permit for the operation of a tour boat (a business operation) on Rainy Lake Basin. Brown applied for a tour boat permit and was denied the same by the NSP. Armstrong did not make a similar application. Both were arrested on Rainy Lake on August 10, 1996 for operating a tour boat within VNP without a permit. After a trial before a United States Magistrate on December 10-11, 1997, a judgment finding Brown and Armstrong guilty of operating a business on VNP

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modified Feb. 25, 1999) <http://www.aqd.nps.gov/stats/dec8190>. In 1997, 230,000 visits were recorded and in 1998, 250,000 visits were recorded. See NPS, Voyageurs NP 1997, 1998 (last modified July 17, 1998) <http://www.aqd.nps.gov/cgibin/ndCGI.exe/stats/Search Page>. Thus, approximately 200,000 persons visited VNP during these time periods. Each person spent approximately $67.50 per day. See Kenneth Hornback, Voyageurs National Park 1995 Summer Visitor Use Survey (visited June 21, 1999) <http:Hwww.nps.gov/voya/research.htm#soc>. The visits are substantially below the estimates of 1.4 million visits per year projected by the NPS at the time VNP was established. See 1.4 Million Expected to Visit Voyageurs the First Year, Duluth Herald, Apr. 14, 1971, at 1.

waters without a permit was entered on April 17, 1998. The defendants appealed their convictions to the United States District Court for the District of Minnesota and that court affirmed by written order on January 5, 1999.

Brown was sentenced to 60 days incarceration and a $5,000 fine. The incarceration and the fine were stayed on the condition that Brown not violate any of the terms of his unsupervised probation. One of the terms of Brown's probation barred his presence in VNP except pursuant to an NPS permit for conducting business operations. Armstrong was sentenced to 30 days incarceration and fined $300. His incarceration was also stayed for one year during which time he was placed on unsupervised probation.

Brown contended in the district court and contends on appeal that the Secretary lacked authority to regulate commercial operations on Rainy Lake and that therefore his conviction must be set aside. He also contends that his sentence represented cruel and unusual punishment under the Eighth Amendment. The district court held that his conviction was valid as the NPS has jurisdiction over waters within the boundaries of VNP based on Minnesota's implied cession of jurisdiction over these waters. The court further decided that the NPS citation of Brown was a proper exercise of its jurisdiction under the property and commerce clauses of the United States Constitution. Finally, the court ruled that the regulations respecting permits violated neither the Webster-Ashburton Treaty of 1842 nor the Root-Bryce Treaty of 1909.

Armstrong, a Canadian citizen, challenged his conviction contending, as did Brown, that the NPS did not have authority to regulate commercial operations in international waters within VNP, and that, in any event, the regulations violated the Webster-Ashburton Treaty of 1842 and the Root-Bryce Treaty of 1909. His arguments were also rejected by the district court. Armstrong renews those arguments on appeal.

## II. Minnesota's Cession of Jurisdiction to the NPS

In United States v. Brown, 552 F.2d 817, 819 (8th Cir.) (Brown I), cert. denied, 431 U.S. 949 (1977), we decided the United States has jurisdiction to enforce regulations controlling activities on waters within the boundaries of VNP. We reasoned that the state of Minnesota had ceded jurisdiction of the waters within VNP to the United States, and noted that the state "was an active participant in the creation of the Voyageur's National Park," passing enabling legislation and otherwise encouraging the development of VNP. See id. at 821. We called attention to the enabling legislation passed by the Minnesota Legislature in 1971, which stated:

> The legislature concurs with the stated purpose of... sections 84B.01 to 84B.10 to preserve, for the inspiration and enjoyment of present and future generations, the outstanding scenery, geologic conditions and waterway system which constituted a part of the historic route of the voyageurs, who contributed significantly to the opening of the northwestern United States . . . . Sections 84B.01 to 84B.10 are a necessary first step in the establishment of the park and is in furtherance of the provisions of section 101 of the act of Congress authorizing the establishment of the park.

See id. (emphasis added).

We are obligated to follow this court's decision in Brown I, and reaffirm its central holding without reservation. We remain of the view that Brown I correctly decided the cession issue and that this action by the state of Minnesota supports

the convictions, regardless of the merits of appellants' other arguments. Accordingly, this opinion affirms the judgment of the district court on the ground that the state of Minnesota consented to the NPS's exercise of jurisdiction over business operations within VNP, including the operation of tour boats.

The state of Minnesota initiated the creation of a national park from lands within its bounds. In 1971, Congress succumbed to the entreaties of the state and authorized the establishment of VNP subject to two relevant preconditions. First, that VNP would not be established or a legal description of its boundaries published unless the state transferred state-owned lands within the proposed boundaries to the Secretary of the Interior (Secretary). See 16 U.S.C. § 160a.

Second, that VNP would be established only when "the Secretary deems sufficient interests in lands or waters have been acquired for administration in accordance with the purposes of this subchapter." 16 U.S.C. § 160a. Prior to passage of the act in January 1971, the state was put on notice of Congress' intentions and the prerequisite expectations to be satisfied by the state were the deal to go through and the Park be established by the Secretary. The state took requisite measures to meet these expectations:

> The Committee has received assurances from the Governor and Attorney General that the State of Minnesota could and would make its lands available for the national park. (See telegram of December 19, following Departmental reports.) If this legislation is enacted into law, it is the desire of the committee that the State and its political subdivisions move without hesitation to donate these properties so that land price escalation of privately owned land will be minimal. If delays occur, creation of the park as presently envisioned may be jeopardized since the

bill contains an appropriation authorization ceiling of $26,014,000 for land acquisition.

S. Rep. No. 91-1513, reprinted in 1970 U.S.C.C.A.N. 5965, 5967.

Senate Report No. 91-1513, dated December 21, 1970, placed the state on notice that the Secretary's authority would have to be recognized in the context of making appropriate and enforceable regulations for the park. In regard to the use of water craft in the proposed park, "[t]he Secretary should have adequate authority to make appropriate regulations in this regard." S. Rep. No. 91-1513, reprinted in 1970 U.S.C.C.A.N. 5965, 5968. Moreover, the Secretary's regulation in effect at the time the legislation was passed specifically gave the Secretary authority to regulate all business operations in VNP. See 36 C.F.R. § 5.3 (originally promulgated December 29, 1966 as 31 Fed. Reg. 16,660, 16,661). It was abundantly clear to all state legislators that if they voted to donate the state lands to the Secretary that VNP would be created, it would comprise not only 139,000 acres of land, but also the 80,000 acres of water in Rainy, Kabetogama, Namakin, Crane, and hundreds of smaller lakes. The state legislature had to have known that both the land and the water were necessary features of the proposed park, as the state's essential role in creation of the park was hotly debated in the legislature. Several amendments to the legislation were proposed, some of which would have killed VNP. See Voyageurs Bill Clears House Subcommittee, Duluth News-Tribune, April 28, 1971; Gene Lahammer, Park Bill Causes Shouting Match in Senate Committee, The Daily Journal (International Falls, Minn.), Apr. 22, 1971. All of these amendments were defeated. A substitute proposal to create a

state rather than a national park was likewise rejected by a substantial majority of the legislature.[2]

Neither Minnesota nor the United States expected or contemplated that the state would transfer its ownership of the lakes to the Secretary, but both understood that if the park were established, the park, including the waters, would be administered by the Secretary of the Interior in accordance with the general statutory authorities regarding the national park system. See S. Rep. 91-1513, reprinted in 1970 U.S.C.C.A.N. 5965, 5965 (noting that proposed park would be "dominated by three large lakes" including Rainy). Legislation passed by the Minnesota State Legislature in 1995,[3] eighteen years after our decision in Brown I, cannot alter the fact that the state consented to the NPS exercising jurisdiction over the waters of VNP in 197 1. Once a state cedes jurisdiction of an area to the United States, it cannot

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[2] Contemporaneous with the vigorous and full debate accorded the legislation that would eventually become Minn. Stat. § 84B.01-.10, an alternative bill to create a Voyageurs State Park on the Kabetogama Peninsula was introduced to the Minnesota Senate and rejected. See State Measure Proposes Park At Kabetogama, Duluth News-Tribune, Mar. 18, 1971. Additionally, an alternative bill establishing a state planning commission to manage the land and waters in the Kabetogama, Namakin and Crane lakes area in Northern Minnesota was introduced to the Minnesota House of Representatives and rejected. See Bill Would Set Up Planning Unit for Kabetogama Area, Duluth News-Tribune, Apr. 20, 1971.

[3] Minnesota statute § 84B.061 provides:

> [N]one of the navigable waters within the park and the lands under them have been donated to the United States. These navigable waters include ... Rainy ... [L]ake[]. Pursuant to applicable federal and state law, navigable waters and their beds are owned by the state. Ownership of and jurisdiction over these waters and their beds has not been ceded by the state, either expressly or implicitly, to the United States.

Minn. Stat. Ann. § 84B.061 (West 1999).

unilaterally reassert jurisdiction. See Paul v. United States, 371 U.S. 245,264 (1963); United States v. Unzeuta, 281 U.S. 138,143 (1930); Fort Leavenworth R. Co. v. Lowe, 114 U.S. 525, 541-42(1885); Yellowstone Park Transportation Co. v. Gallatin County, 31 F.2d 644, 645 (9th Cir.); Rogers v. Squier, 157 F.2d 948,950 (9th Cir. 1946). Consequently, we now reaffirm our holding in Brown I that Minnesota ceded jurisdiction to the NPS over waters within the boundary of VNP.

## III. Constitutional and Treaty-Based Challenges To Jurisdiction

While we understand Minnesota's cession of the lands and waters comprising VNP to foreclose any argument concerning Congress' power to unilaterally enact regulations governing commercial activity within the park, we nonetheless address these arguments in the interest of finality. Brown and Armstrong argue that Congress did not have the power under the Commerce and Property Clauses of the Constitution to enact 16 U.S.C. § 1a-2(h), authorizing the NPS to "promulgate and enforce regulations concerning boating and other activities on or relating to waters located within areas of the [NPS]." 16 U.S.C. § 1a-2(h) (1998). The district court properly ruled that Congress does have such authority and that it provides an "additional basis for jurisdiction" independent of the jurisdiction Minnesota ceded to the United States. (Memorandum and Order, at 4.)

In Kleppe v. New Mexico, 426 U.S. 529, 546 (1976), the Supreme Court held that Congress may make those rules regarding non-federal lands as are necessary to accomplish its goals with respect to federal land. This court followed Kleppe in Brown I, where we stated:

> The crucial question is whether federal regulations can be deemed "needful" prescriptions "respecting" the public lands. This determination is primarily entrusted to the judgment of Congress, and courts exercising judicial review have supported an expansive reading of the Property Clause. In light of these general standards, we view the congressional power over federal lands to include the authority to regulate activities on non-federal public waters in order to protect wildlife and visitors on the lands.

552 F.2d at 822. We again followed Kleppe in Minnesota by Alexander v. Block, 660 F.2d 1240 (8th Cir. 1981). In Block, the state of Minnesota contended that Congress did not have the power to enact motorboat use restrictions on surface waters within a wilderness area. The district court rejected the state's claims and we affirmed, stating:

> Under this [Property Clause-based] authority to protect public land, Congress' power must extend to regulation of conduct on or off the public land that would threaten the designated purpose of federal lands. Congress clearly has the power to dedicate federal land for particular purposes. As a necessary incident of that power, Congress must have the ability to insure that these lands be protected against interference with their intended purposes.

Id. at 1249.

We are unable to distinguish the facts here from those in Kleppe, Brown I, and Block. In each case, Congress invested the Department of the Interior with the power and authority to impose reasonable regulations with respect to conduct occurring within the boundaries of public lands under the

department's control. Here, the regulation requiring that commercial tour boat operators obtain a permit before operating commercial tour boats within VNP is well within the authority of the NPS.

Not only is the regulation relating to the permitting system consistent with the purpose of VNP,

> to preserve, for the inspiration and enjoyment of present and future generations, the outstanding scenery, geological conditions, and waterway system which contributed a part of the historic route of the Voyageurs who contributed significantly to the opening of the Northwestern United States,

16 U.S.C. § 160 (emphasis added), but also Congress has specifically directed the NPS that,

> in accordance with the fundamental purpose of conserving their scenery, wildlife, natural and historic objects, and providing for their enjoyment in a manner that will leave them unimpaired for the enjoyment of future generations, the Congress hereby finds that the preservation of park values requires that...public accommodations, facilities, and services as have to be provided within [park system] areas should be provided only under carefully controlled safeguards against unregulated and indiscriminate use, so that heavy visitation will not unduly impair these values,

16 U.S.C. § 20.[4]

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[4] Though constitutional analysis of the NPS regulation at issue here is appropriately aimed at Congress' power under the Property Clause, appellant's also forward a Commerce Clause argument. Their challenge of

Defendants additionally contend that regulation of tour boats in VNP violates the Root-Bryce Treaty of 1909, 36 Stat. 2448, and the Webster-Ashburton Treaty of 1842, Aug. 9, 1842, 8 Stat. 572. The 1909 treaty provides:

> The High Contracting Parties agree that the navigation of all navigable boundary waters shall forever continue free and open for the purpose of commerce to the inhabitants and to the ships, vessels, and boats of both countries equally, subject, however, to any laws and regulations of either country, within its own territory, not inconsistent with such privileges of free navigation and applying equally and without discrimination to the inhabitants, ships, vessels, and boats of both countries.

36 Stat. at 2449 (emphasis added).[5]

We disagree with defendants' contention. The treaties make clear that both the United States and Canada may adopt laws and regulations not inconsistent with the privileges of free navigation, so long as the laws and regulations are applied in a nondiscriminatory manner. Certainly, requiring a

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Congress' power is unconvincing. Congress' authority to regulate commerce and to delegate significant portions of this power to the Executive Branch is well established. See United States v. Appalachian Power Co., 311 U.S. 377, 426 (1940); California Bankers Ass'n v. Shultz, 416 U.S. 21, 59 (1974).

[5] Article II of the 1842 treaty states:

> It being understood that all the water-communications and all the usual portages along the line from Lake Superior to the Lake of the Woods; and also Grand Portage, from the shore of Lake Superior to the Pigeon River, as now actually used, shall be free and open to the use of the citizens and subjects of both countries.

Webster-Ashburton Treaty, Aug. 9, 1942, 8 Stat. 572, 574 (1842).

tour boat operator in a national park to obtain a permit is not unreasonable and is not inconsistent with the privileges of free navigation. Moreover, it is clear that the regulations are applied in a nondiscriminatory manner. The regulation is equally applicable to American and Canadian citizens who seek to operate a business operation in VNP.

We face here with the same argument raised by defendants in Block, 660 F.2d at 1240, respecting the Boundary Waters Canoe Area. In that case, we concluded that the free and open provision of the treaties did not preclude either signatory to the treaties "from enacting reasonable regulations affecting commerce along the waterways, as long as the regulations apply equally to citizens of both countries." Id. at 1258. In reaching this decision, we gave weight to an opinion of the State Department which stated:

> We believe that the intent of the "free and open" provision for these waters was to ensure that this important route remained open, on an equal basis, to the nations of both countries. It would not be correct, however, to interpret "free and open" so broadly as to prohibit either United States or Canadian authorities from imposing any limitation upon the manner in which such waterways and portages may be used. In agreeing to free and open use of these waterways and portages, neither party intended to relinquish its sovereign role of imposing statutory limitations on behavior which would not be in the best interest of the respective country.

Id. at 1258 (quoting Letter from Robert J. McCloskey to Hon. James L. Oberstar) (quoted in National Ass'n of Property Owners v. United States, 499 F. Supp. 1223, 1234 (D. Minn. 1980)) (footnote omitted).

We find no relevant difference between the BWCA regulation which precluded motorized use, except on designated lakes and rivers, and VNP regulation which prohibits business operations in VNP, except pursuant to a permit or other written agreement with the United States.[6]

## IV. Sentencing

Brown contends that his fine and sentence are excessive and constitute cruel and unusual punishment under the Eighth Amendment to the United States Constitution. We disagree with one exception. One of the conditions of Brown's probation is that Brown have "no presence" in VNP except pursuant to the terms and conditions of any permits for the conduct of commercial operations granted to him by the NPS.

Brown makes two arguments as to why such conditions are violative of the Constitution. First, he states that his livelihood depends on his traveling through VNP as a federally-licensed tanker to deliver supplies to families on the lake. The short answer to this contention is that Brown can seek a permit from the NPS to operate his tanker delivery service. Thus, he will not be deprived of his livelihood if he meets VNP requirements for such a permit. Of course, Brown will have to do something that he does not want to do to obtain the permit - recognize the jurisdiction of the NPS over business operations in VNP - but we have resolved that issue

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[6] At trial a park ranger testified that a Canadian tour boat would not violate 36 C.F.R. § 5.3 if it entered the Brule Narrows from the Canadian side of the border and exited back to the Canadian side of the border. This is a sensible interpretation of the regulation. See Griffin v. Oceanic Contractors, 458 U.S. 564, 575 (1982) ("A statute should be construed to make sense. . . ."); Irving v. Clark, 75 8 F.2d 1260, 1263 (8th Cir. 1985). It allows a Canadian tour boat operator to use the narrows which are in American waters to pass from Canadian waters to Canadian waters without having to obtain an American permit. Here, however, Armstrong was several miles away from the Brule Narrows in American waters.

and it is not a violation of either the Constitution or the sentencing guidelines to require that Brown submit to the permitting process if he desires to operate a commercial tanker delivering supplies to persons living within VNP.

Second, he states that it is cruel and unusual punishment to make it a condition of probation that he not enter VNP to pursue the same non-business activities that other visitors to VNP pursue. We agree. We understand that Brown has persisted for a long time in his quest to have the federal courts decide that the NPS is without authority to regulate commercial activities on the lake, but this fact is not a sufficient reason to deny Brown the same satisfaction that other visitors of VNP enjoy.

We affirm the district court with this one exception and remand the matter to the district court for the sole purpose of modifying the conditions of probation so as to permit Brown to visit VNP to engage in the same recreational and educational activities as other visitors to VNP.

## V. Remaining Issues

We have carefully reviewed the remaining issues raised by the parties and conclude that they are without merit.

## VI. Conclusion

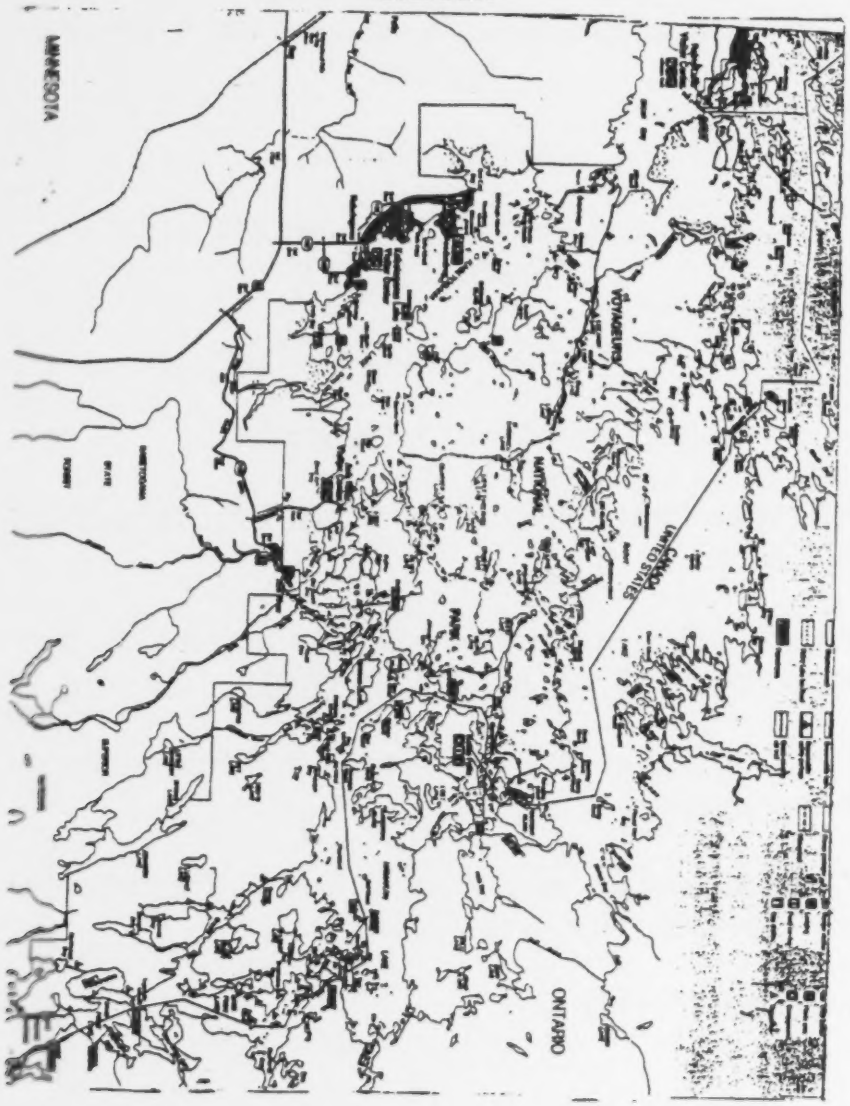
We affirm the judgment and decision of the district court in all respects except as to the sentence of Brown and remand to the district court for the purpose of modifying his sentence.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

APPENDIX I



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*1999 U.S. App. LEXIS 22127, **

United States of America, Appellee, vs. Carl E. Brown, Appellant.

No. 99-1191MNST

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

1999 U.S. App. LEXIS 22127

September 10, 1999, Decided

**NOTICE:** [*1] DECISION WITHOUT PUBLISHED OPINION

**PRIOR HISTORY:** Original Opinion of July 28, 1999, Reported at: **1999 U.S. App. LEXIS 17897.**

**OPINION:** Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

September 10, 1999